United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

75-7060

To be argued by
SHELDON ENGELHARD

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In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAPAN AIR LINES COMPANY, LTD.,

Plaintiff-Appellee,

P/S

-against-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM"); IAM DISTRICT LODGE NO. 151; FUSAO OGOSHI, individually and as Senior Business Representative of IAM District Lodge No. 151; ROBERT QUICK, individually and as Grand Lodge Representative of IAM; ROLLO SAVINO, GREGORY McLAUGHLIN, WILLIAM WHITBREAD, MAX SUZUKI, TATSUO SHIRAISHI, STANLEY NAGAOKA, YOSHIAKI KARASHIMA, GARY HIROSHIMA and HIROSHI TARUMI, individually and as representatives of a class consisting of all of plaintiff's employees represented by IAM and employed in the United States,

Defendants-Appellants.

SUPPLEMENTAL
BRIEF FOR DEFENDANTS-APPELLANTS

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DOCKET NO. 75-7060

PRELIMINARY STATEMENT

This supplemental memorandum is submitted in behalf of the defendants-appellants (hereinafter the "IAM") for the purpose of bringing to the Court's attention authorities which will demonstrate that the Order of the Court below, dated January 22, 1975 (designated "Temporary Restraining Order"), is properly appealable (and, furthermore, must be vacated).

ARGUMENT

THE ORDER OF THE COURT BELOW IS AN APPEALABLE ORDER PURSUANT TO 28 U.S.C. § 1292 (a) (1).

The Order of the Court below, dated January 22, 1975, restrained and enjoined the IAM from:

1) Bargaining about proposed modification of the "Scope of Agreement" article in the previous collective bargaining agreement:

2) Engaging in any form of economic self-help to induce the making of a new collective bargaining agreement.

That order was designated a "Temporary Restraining Order" to be effective from January 22, 1975 until 5 pm January 31, 1975, a period of nine (9) days.

Plaintiff-appellee (hereinafter "JAL") contends, quite simply, that because the Order of the Court below is labelled a temporary restraining order, it cannot be appealed. However, upon closer analysis, it will be shown that, as this Court stated in Grant v. United States, 282 F. 2d165, 167 (2d Cir. 1960), "(T)he label put on the order by the trial court is not decisive "

What is decisive was set forth by the holding of this Court in Pan American World Airways v. Flight Engineers Int. Assoc., 306 F. 2d 840 (2d Cir. 1962):

> "We hold, therefore that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U.S.C. § 1292 (a)(1). Sims v. Greene, 160 F. 2d 512 (3d Cir. 1947); Missouri-K-T R.R. Co. v. Randolph, 182 F. 2d 996 (8th Cir. 1950); Western Union Telegraph Co. v. United States and Mex Trust Co., 221 F. 545,553 (8th Cir. 1915); Grant v. United States, supra, 282 F. 2d 167-168 (dictum); see 7 Moore, Federal Practice, ¶65.07 (2d Ed. 1955); 3 Barron & Holtzoff, Federal Practice and Procedure, §1440 (Wright ed. 1958)."
>
> (at 843)

The key phrase in the above quotation is "beyond the period of statutory authorization." Thus it becomes most significant to identify what the period of statutory authorization is.

The IAM contends that the Order of the Court below arises out of a "labor dispute" and is clearly governed by the provisions of the Norris-LaGuardia Act (29 U.S.C. § 101 et seq.). Specifically, § 107 of that act provides that a temporary restraining order issued in cases growing out of labor disputes "shall be effective for no longer than five days and shall be void at the expiration of said five days." No mention is made of a longer period, nor is there any provision relating to extensions.

In support of its authority to issue a nine (9) day "temporary restraining order," the Court below ostensibly relies upon F.R.C.P. Rule 65 (b) (not an Act of Congress) which allows for temporary restraining orders not to exceed ten (10) days (with a provision for extension). The reliance of the Court below upon Rule 65 (b) is, however, plainly misplaced. Indeed, Rule 65 (e) expressly states: "These rules do not modify any statute of the United States relating to temporary restraining orders and

preliminary injunctions in actions affecting employer and employee." In fact Rule 65 (e) in its present form is a broadening of the language of the former (pre-1948) Rule, which stated that it did not modify the "Norris-LaGuardia Act." See 7 Moore's Federal Practice ¶65.03 (2) (2d Ed. 1974).

Therefore, it should be apparent that the Order of the Court below exceeded its statutory authorization by a period of four (4) days. The danger inherent in such a ruling was aptly stated in the Pan American World Airways case, supra. The words of Judge Hays were:

> "The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. Such an order is neccessarily limited to a very brief period because what may later prove to be a right of the party who is restrained is suspended before even a tentative adjudication as to that right has been had. A union, for example, may have a perfect right to strike and may have chosen a particularly opportune time for doing so. By the issuance of a temporary restraining order a court, without adjudicating the basic right, prohibits the strike. The longer the period of such prohibition the greater the chance that the right will be completely frustrated because the opportunity once suspended may, as a practical

> matter, be lost. And frequently recovery on the bond will not compensate adequately for the suspension or loss of the right involved. It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65 (b) [The Court did not deal with the issue of whether the five (5) day limitation of the Norris-LaGuardia Act (29 U.S.C. §107) properly governed.] by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.
>
> It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgement rule to permit review of preliminary injunctions. 28 U.S.C. § 1292(a) (1). To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued without a preliminary adjudication of the basic rights involved, would completely defeat the purpose of this provision.
>
> (at 843)
> [emphasis supplied]

While the above opinion dealt with the extension of a previously issued temporary restraining order, there is no meaningful distinction between an order which is extended for a period beyond its statutory authorization and one, such as the order of the Court below, which is ab initio to be effective for a period clearly in excess of the time provided by statute.

The validity of the above analysis was upheld by the Eighth Circuit in Telex Corp. v. International Business Machines Corp., 464 F. 2d 1025 (8th Cir. 1972). There, the Court stated:

> "This matter was heard on an expedited appeal from the district court's entry of a 'temporary restraining order' dated July 21, 1972. The order entered by the district court enjoins I.B.M. inter alia from announcing certain new products on or about August 2, 1972, and until such time that Telex Corporation's motion for preliminary injunction is heard and submitted to the district court on or before September 1, 1972. In view of the fact that the lower court's order exceeds the ten day limitation as set forth in Rule 65(b) of the Federal Rules of Civil Procedure, this court finds that the order so entered is tantamount to an issuance of a preliminary injunction and that the order entered on July 21, 1972, is an appealable order. See Pan American World Airways, Inc. v. Flight Engineer's International Association, 306 F. 2d 840 (2 Cir. 1962); Missouri-Kansas R.R. v. Randolph, 182 F. 2d 996 (8 Cir. 1950)."
>
> (at 1025)
> [emphasis supplied]

In light of the fact that the case herein is governed by the Railway Labor Act (45 U.S.C.§151 et seq.), which evidences a clear legislative intent to allow the parties in a major dispute to engage in economic self-help after the statutory procedures have been fully exhausted, there

should be no hesitance on the part of this Court to find that the order of the Court below was tantamount to the issuance of a preliminary injunction and, therefore, properly appealable.

CONCLUSION

For the reasons set forth in this Supplemental Memorandum, it is submitted that the order of the Court below, dated January 22, 1975, was an appealable order pursuant to 28 U.S.C. §1292(a)(1) [providing for the review of preliminary injunctions]. And, for the reasons set forth in the IAM's initial Memorandum, said order should be vacated, leaving the IAM free to engage in economic self-help immediately, in accordance with the mandate of the Railway Labor Act.

Respectfully submitted,

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